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NO. 81-469

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1982

WILLIAM C. BUSH,
Petitioner,

vs.

WILLIAM R. LUCAS
Respondent.

On Writ Of Certiorari To
The United States Court Of Appeals
For The Fifth Circuit

PETITIONER'S REPLY BRIEF

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ARGUMENT

Congress Has Not Precluded a *Bivens*-Type Remedy In This Case

The authors of the Brief for the Respondent[1] do not dispute, indeed they penultimately concede, "the existence of the *well-established* constitutional right asserted by . . . [Bush]." (Lucas' Brief, at 44; emphasis ours.) That right, somewhat broadly stated, is the right of a civilian employee

[1]We hereinafter call that brief "Lucas' Brief." We hereinafter call the Petitioner's Opening Brief "Bush's Opening Brief."

of the federal government to be free from abuse and perversion of power in reprisal for the employee's having engaged in free speech.[2] (See ¶¶ 2 through 6, Count Four, Complaint, J.A. 4–7; see, also, Bush's Opening Brief, at 16 and 19.)

While Lucas thus concedes the existence of that right, Lucas nevertheless insists that Bush has no *Bivens*-type remedy against Lucas for the asserted invasion of that right. Lucas insists that Congress has precluded such a remedy against Lucas personally. (Lucas' Brief, 8, 9–10, 17, 28, 41 *et passim*.) Lucas either says or intimates, several times and in several ways, that Congress has interdicted a *Bivens*-type remedy for Bush, and for others similarly situated, in one or both of two ways.

One way that Congress has interdicted a *Bivens*-type against him, Lucas says or intimates (Lucas' Brief, at 6, 8, 9, 14, 17, 20, 23, 24), is by providing specific compensatory remedies, under original delegation to the Civil Service Commission, for what Lucas, with technical accuracy though evasive effect, uniformly calls a "personnel action."[3]

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[2]More narrowly stated, the right asserted by Bush is the right of a civilian employee of the United States Government to be free from the consequences of a conspiracy to effect his demotion (¶¶ 2 through 6, Count Four, Complaint, J.A. 4-7) as punishment (J.A. 73) for his having "let . . . members of Congress, members of the press, and some few members of the public know of the waste which he observed to be rampant . . . at [the governmental facility where he was employed and which the conspirators managed.]" (¶ 6, Count Four, Complaint, J.A. 7; and, as to the managerial status of the alleged conspirators, please collate the first full paragraph–after the carryover paragraph–at J.A. 14, part of the Lucas affidavit, with the first of the two paragraphs numbered "2" in Count Four of the Complaint, at J.A. 4-5; and see, further, Bush's Opening Brief, at 5-6.)

[3]When neither directly quoting others nor adopting statutory or regulatory terminology, Lucas' counsel describe the putatively remedied "personnel action[s]" as either "unlawful" or "unconstitutional." (Lucas' Brief, at 8.) When either quoting from isolated items of legislative history or employing statutory or regulatory terminology, Lucas' counsel describe those personnel actions as "adverse" (*id.*, at 31, 32, 38); "unjustified" (*id.*, at 32); "unjustified or erroneous" (*id.*); "unjustified

Lucas in effect points to the Pendleton Act of 1883 (*id.*, at 29, 45), the Lloyd-LaFollette Act of 1912 (*id.*, at 18–19, 29, 30, 45), the Veterans' Preference Act of 1944 (*id.*, at 31, and the Back Pay Acts of 1948 and 1966 (*id.*, at 31–32) as milestones along the route by which Congress, either aided or goaded by occasional Presidential action (*id.*, at 29, 30, 31), had provided remedies at wholesale for the Civil Service Commission to dispense at retail prior to the time of the "unlawful personnel action" eventuating in the present suit.

The other way that, as Lucas says or intimates, Congress has precluded a *Bivens*-type action against him by "occupy[ing] the field. . . ." (Lucas' Brief, at 7, 8, 9, 10, 26–28, 34–36 and 39–41.) Lucas evidently would have this Court to infer that the supposedly occupied field embraces *all* remedies, against whomsoever, for constitutional violations consummated under the guise of an adverse personnel action. (*Id.*, at 9, 10, 16, 26, 34–36, 39–41.)

There are, we submit, significant defects in both branches of Lucas' preclusion argument. Nor does the whole of the argument exceed the sum of its parts. Notwithstanding certain somewhat specious strictures of Lucas' counsel (Lucas' Brief, at 8–9, 21–22, 23, 24, 40 n.22), we believe that Part II (pp. 23–29) of Bush's Opening Brief still sufficiently shows that the particular remedies extolled in the Lucas Brief could *not* have been intended to pre-empt a *Bivens*-type remedy in this case.[4] We pass, therefore, to a con-

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or unwarranted" (*id.*); or, in language taken from the CSRA of *1978*, "prohibited" (*id.*, at 33), citing 5 U.S.C. (Supp. V) [§] 1206.

However described, a personnel action, taken by an agency or officer of the Government, is not the same wrong as, nor should it obscure, let alone insulate, the antecedent wrong of the individual human being or beings who abuse official positions in order to procure the adverse or prohibited action to be taken.

[4]Moreover, the briefs *amici* thoroughly refute Lucas' contention that the civil service remedies pre-empt a *Bivens*-type remedy in the case at bar. See Brief of ACLU, *Amicus Curiae*, at 45-49; Brief of AFL-CIO et al.,

sideration of the broader branch of Lucas' preclusion argument.

In an apparent attempt to avoid *Bivens*, *Davis* and *Carlson* altogether, Lucas argues that the pre-*Bivens* civil service remedies envinced a Congressional intent "to occupy the field in a way . . . [that] felt no room for judicially-*created* remedies." (Lucas' Brief, at 26; emphasis ours.) Initially reading too much into an anachronism,[5] Lucas tenders an extended commentary (*id.*, at 27–41) upon "the structure of the civil service remedies, the presuppositions about the judicial role that existed when they were enacted, and Congress's care in shaping the remedies. . . ." (*Id.*, at 26.) Lucas tenders those topics as "indicia of legislative intent" (*id.*) to occupy the entire field of remedies for whatever deprivations and wrongs might be inflicted, by whom-

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as Amici Curiae, at 13-16; Brief *Amicus Curiae* of Representatives Patricia Schroeder et al., . . . Members of Congress, and The National Taxpayers Union, at 11-16; and Brief of *Amicus Curiae* National Treasury Employees Union, at 14-23.

[5]Since all but one of the particular statutes invoked, or re-invoked, by Lucas in his chronological development of this branch of his preclusion argument (Lucas' Brief, at 29-32) antedated *Bivens*, Lucas says that "[i]t is . . . pointless to seek an explicit expression of legislative intent to preclude a *Bivens* remedy [in those statutes.]" (*Id.*, at 26.) It is one thing to say, in effect, that it is pointless to assume that Congress in 1883, 1912, 1944, 1948 or 1966 might have foreseen that this Court, in 1971 and in a case styled *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, would render a particular decision—even a decision foreshadowed no later than 1946 in *Bell v. Hood*, 327 U.S. 678. It is quite another thing to say, as Lucas immediately does, that, in enacting the pre-*Bivens* civil service statutes, "Congress had *no reason* to believe that there were any other *possible remedies available to civil servants;* [and that Congress] . . . thus had *no reason* to address the question of whether the remedies it prescribed were exclusive." (*Id.*,; emphasis ours.) The first of the quoted statements may be literally correct. The latter by no means follows: as we hereafter show, there were other than chronological reasons for Congress' failure explicitly to state that it meant for the remedies, if any, which it provided in particular pre-*Bivens* statutes "to be a *substitute* for recovery directly under the Constitution and [that Congress] viewed [such remedies, if any,] as equally effective [as "recovery directly under the Constitution."] (*Carlson v. Green*, 446 U.S. at 18-19.)

soever, upon individual human beings in connection with the victims' work as civilian employees of the United States Government.

As the Court no doubt will observe, only one of those suggested indicia has escaped prior canvassing by Bush and the amici.[6] That one suggested indicium is "the presuppositions about the judicial role that existed. . . ." when Congress enacted the successive civil service statutes.

As an original matter, it may well be doubted that, unless much more thoroughly and authoritatively documented than such mental states usually are, "presuppositions" about institutional roles are trustworthy guides to legislative intent. So far as we have been able to discover, Lucas cites no contemporaneous source disclosing the existence of the postulated presuppositions. Instead, Lucas relies upon after-the-fact observations (Lucas' Brief, at 34—36), made in sundry contexts, to work his way to his truly startling conclusion that, "during the time when most of the civil service remedies available to . . . [Bush] were

[6]For discussion or mention of the structural inadequacies of the civil service remedies to preclude a *Bivens*-type remedy in this case, see Bush's Opening Brief, at 27-29 (sub-paragraphs (d) and (e) of Part II B of the Argument); Brief of the ACLU *Amicus Curiae*, at 47 & n. 12; Brief of AFL-CIO *et al.* as Amici Curiae, at 7 & n. 3; Brief *Amicus Curiae* of Representatives Patricia Schroeder et al. . . ., Members of Congress, and The National Taxpayers Union, at 12; and Brief of Amicus Curiae National Treasury Employees Union. . ., at 16-17, 21 & n. 11.

For observations relating to "Congress's care in shaping the remedies. . . ," see Bush's Opening Brief, at 14 (1st ¶). 17-18 (Part I A 2 of Argument) and, again, 27-28 (sub-paragraphs (d) and (e) of Part II B of the argument); Brief of the ACLU *Amicus Curiae* at 57. ("If Congress, in its 'fine tuning' of civil service remedies, had intended to supplant existing judicial remedies, one would expect to find clear indication of such an intent."); Brief *Amicus Curiae* of Representatives Patricia Schroeder et al. . . ., Members of Congress, and The National Taxpayers Union, 9-10, 12-13; and Brief of Amicus Curiae National Treasury Employees Union, at 21 ("Further evidence of Congress' intent not to displace pre-existing *Bivens* remedies for federal employees is found in the fact that no mention of such intent is contained in the Civil Service Reform Act which was enacted nearly a decade after *Bivens* was decided.")

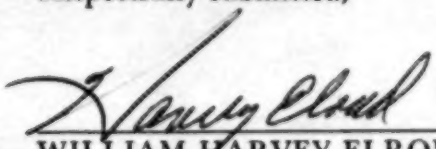
created, the 'long established and familiar principle [. . .]' (*Isbrandtsen Co. v. Johnson*, . . . 343 U.S. at 783) was that remedies for civil servants' claims—*including their constitutional claims*—were the province of Congress and the executive branch." (Lucas' Brief, at 36; emphasis ours.)

Such conclusion, we submit, is so at variance with principle and precedent as to require rejection of the postulated "presupposition" of judicial subordination to legislative will with respect to constitutional questions. "At least in the absence of 'a textually demonstrable constitutional commitment of [an] issue to a coordinate political department,' *Baker v. Carr* . . . [369 U.S.] at 217, we presume that justiciable constitutional rights are to be enforced through the courts." *Davis v. Passman*, 442 U.S. at 242. Lucas has not demonstrated any constitutional commitment to Congress of the issue of whether civilian employees of the federal government are entitled, as other citizens are, to a *Bivens*-type action against federal functionaries who violate constitutional rights of citizens—particularly, admittedly "well-established constitutional right[s] . . ." (Lucas' Brief, at 44.)

CONCLUSION

Notwithstanding Lucas' Brief, the judgment of the court of appeals should be reversed and the case remanded to that court, with directions further to remand the case to the trial court for trial after allowance of time for full discovery.

Respectfully submitted,



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